AMSTEEL SECURITIES (M) SDN BHD

v.

DATUK HWONG YOU CHUAANG

HIGH COURT MALAYA, KUALA LUMPUR
LOW HOP BING J
[SUIT NO: MT3-22-19-1998]
29 JUNE 2001

BANKING: *Securities for advances - Continuing guarantee to secure share financing facilities - Forbearance to sue in guarantee - Whether plaintiff estopped from enforcing guarantee - Interest - Legality of charging of interest upon interest - Applicability of Yeng Hing Enterprise Sdn Bhd v. Datuk Dr. Ong Poh Kah - Civil Law Act 1956, s. 11 - Certificate of indebtedness - Whether contains manifest error - Whether certificate to be taken as conclusive proof of debt - Conclusive evidence clause in guarantee - Whether binding on defendant*

CONTRACT: *Continuing guarantee - Element of forbearance - Whether plaintiff estopped from enforcing guarantee - Interest - Charging of interest upon interest - Legality of - Conclusive evidence clause - Effect of - Whether defendant bound by clause - Whether guarantee binding on defendant*

The defendant had executed a continuing guarantee in favour of the plaintiff for the purpose of share financing facilities for a customer. The customer was subsequently indebted to the plaintiff, and the plaintiff in turn, sued the defendant to recover the debts accrued. The learned senior assistant registrar awarded summary judgment on behalf of the plaintiff in the sum of RM1,660,733.57 inclusive of interest. The defendant appealed to the judge in chambers. The defendant argued that the guarantee contains a provision forbearing the plaintiff from suing the defendant and thus, the plaintiff is estopped from enforcing the guarantee. He further submitted that the plaintiff had charged interest upon interest which is prohibited by s. 11 of the Civil Law Act 1956 (the "CLA 1956"), and that the certificate of indebtedness issued by the plaintiff under a conclusive evidence clause in the guarantee, *ie* cl. 12, contains a manifest error as the amount of RM1,660,733.57 was not shown in the certificate.

Held:

[1] Since no express time is stipulated in the forbearance contained therein the guarantee, the law implies that so long as the plaintiff as promisor of the consideration has exercised the forbearance to sue after a reasonable

time such as a couple of weeks, as in the instant case, then the plaintiff would not be in breach of the guarantee by exercising the right to sue.

[2] The tenor of the Supreme Court judgment in *Yeng Hing Enterprise Sdn Bhd v. Datuk Dr Ong Poh Kah*, made it clear that compound interest or interest upon interest is permissible if the agreement of the parties expressly or impliedly provides for such payment. Where there is no such express or implied agreement as to the compound interest, s. 11(a) of CLA 1956 forbids the giving of interest upon interest. In this instance, since the customer and the plaintiff have expressly agreed to oblige the customer to pay all interest including interest upon interest, hence, the plaintiff is entitled to recover all the compound interest accrued, the payment of which the defendant has expressly guaranteed.

[3] As contended by the defendant, the certificate of indebtedness did not show the plaintiff's claim amount of RM1,660,733.57. The certificate instead showed a total outstanding larger sum of RM1,740,548.54, which was not challenged or disputed by the defendant. It is the court's view that there is no manifest error in the certificate of indebtedness. Furthermore, the defendant has not successfully discharged the burden of proving that the certificate contains a manifest error, hence, cl. 12 of the guarantee is binding on the defendant and so, the certificate is construed as conclusive evidence of the debt claimed by the plaintiff against the defendant. On the foregoing grounds, the decision of the registrar giving O. 14 judgment in favour of the plaintiff is correct and is hereby upheld.

[Appeal dismissed with costs.]

Case(s) referred to:

Cooper v. Joel [1859] 1 De GF & J 240 ***(refd)***
D&C Nomura Merchant Bankers Bhd v. Gunung Kuari Sdn Bhd & 3 Ors [1990] 2 CLJ 58 ***(refd)***
Miles v. New Zealand Alford Estate Co [1866] 32 Ch 266 ***(refd)***
Oldershaw v. King [1857] 2 H&N 517 ***(refd)***
Oriental Bank Bhd v. Jaafar Sidek Mohd Salam & 2 Ors [1990] 2 CLJ 72 ***(refd)***
Rolt v. Cozens [1856] 18 CB 673 ***(refd)***
Yeng Hing Enterprise Sdn Bhd v. Datuk Dr Ong Poh Kah [1988] 2 MLJ 60 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 11(a)
Rules of the High Court 1980, O. 14

Other source(s) referred to:

Geraldine Andrews and Richard Millet, *Law Of Guarantees*, Longman, pp 13, 21, 22, 23

For the defendant - Navamalar Ganesan; M/s Siva, Ram & Assocs
For the plaintiff - HY Loo; M/s JM Chong, Vincent Chee & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Low Hop Bing J:

Appeal

On 17 August 1999, pursuant to the plaintiff's application in encl. (13) for summary judgment under O. 14 of the Rules of the High Court 1980, the learned senior assistant registrar gave judgment for the plaintiff in the sum of RM1,660,733.57 together with interest at 15.5% per annum with effect from 12 November 1997 until full realisation and costs on a solicitor-client basis. Against that decision, the defendant has lodged encl. (26) i.e. an appeal to me as judge in chambers.

Submission For Defendant

Navamalar, learned counsel for the defendant, raised two matters on which she relied to support her contention that there are triable issues and so the learned senior assistant registrar should not have given summary judgment to the plaintiff. In essence, these two matters are:

1) Under cl. 1 of the guarantee executed by the defendant on 23 May 1997, which forms the subject matter of the plaintiff's claim, the plaintiff cannot and is indeed estopped from enforcing the guarantee as cl. 1 contains a provision forbearing the plaintiff from suing the defendant and that the plaintiff by suing the defendant herein has committed a breach of the guarantee. Learned counsel added that when the defendant executed the guarantee, no liability has accrued to the customer i.e. one Hwong You Soon, for whom the defendant stood guarantee, as the customer has not opened any account yet. He also contended that the guarantee binds the plaintiff who has also committed a breach thereof by suing the customer *vide* Shah Alam Civil Suit No. 4-22-567-97 and has obtained judgment for RM1,660,733.57 together with interest at 15.5% per annum with effect from 11 November 1997 until full realisation and costs.

2) The second matter raised for the defendant was that the plaintiff has charged interest upon interest which is prohibited by s. 11 of the Civil Law Act 1956 and that the certificate issued by the plaintiff under a conclusive evidence clause contains a manifest error as the amount of RM1,660,733.57 was not shown therein.

Response By Plaintiff

HY Loo, learned counsel for the plaintiff, submitted that the guarantee executed by the defendant on 23 May 1997 is supported by two types of consideration flowing from the plaintiff *viz.* "agreeing to forebear and not to commence legal proceedings for recovery and in further consideration of your agreeing to grant and or continuing to grant or making available to the persons whose name and particulars appear in the second schedule hereto (hereinafter referred to as the "customer") share margin facilities and or any other kind of financing scheme ... .

It was contended for the plaintiff that since no specific time has been set for the plaintiff's forbearance to sue, the plaintiff is able to sue within a reasonable time. Learned counsel stressed that account No. HW 0018 has been opened for the customer and facilities had been extended to the said customer to carry out contra shares transactions to the tune of RM5 million. There was in the view of plaintiffs counsel no question of the plaintiff committing a breach of the guarantee at all.

In respect of the interest charged by the plaintiff, it was the plaintiff's contention that pursuant to cl. 7 of the agreement between the plaintiff and the customer, the plaintiff is entitled to charge interest at 2% of the plaintiff's cost of the fund on all sums due and owing before and after judgment until full realisation. She subscribed to the view that s. 11 of the Civil Law Act 1956 does not apply.

She finally argued that there was no manifest error in the certificate of indebtedness which is therefore conclusive evidence thereof and so she prayed that the appeal by the defendant be dismissed with costs.

Decision Of The Court

Consideration For the Guarantee

The defendant's contention in this respect does not sound convincing as cl. 1 of the continuing guarantee executed by the defendant in favour of the plaintiff has expressly stated the relevant consideration as follows:

> (1) In consideration of you having at my/our request agreeing to forebear and not to commence legal proceedings for recovery and in further consideration of your agreeing to grant and or continuing to grant or making available to the persons whose name and particulars appears in Second Schedule hereto (hereinafter referred to as the "Customer") share margin facilities and or any other kind of financing scheme which you

> may from time to time in your absolute discretion determine (the facilities shall hereinafter be collectively referred to as "Financial Facilities") for the express purpose of enabling you to finance the purchase by the Customer of any share, securities, stocks, loans, warrants, options and or any other kind of derivatives listed on the Kuala Lumpur Stock Exchange (KLSE) or any other recognised exchange (hereinafter collectively referred to as "Securities"). We The Undersigned Guarantors whose names and addresses appear in the First Schedule herewith annexed (hereinafter referred to as "the said Guarantors") jointly and severally guarantee as Principal Debtors and not merely as sureties the payment of all outstanding sums due and owing by the Customer to you whether certain or contingent now or hereafter owing or incurred by the Customer on any account or in any manner whatever together with all costs and charges (including legal charges on a solicitor-client basis) and expenses which you may incur in enforcing payment for the sum of money due to you from the Customer to you.

It is common ground that when the guarantee was executed on 23 May 1997, the customer's account No. HW 0018 has just been opened and there was at that juncture no liability incurred by the customer. However, the customer was on 28 October 1997 indebted to the plaintiff in the sum of RM1,651,874.32 together with interest continuing at the rate of 2% above the cost of fund (which was at that time 13.5% per annum). The plaintiff did not sue the customer immediately but on 15 November 1997 commenced a writ action *vide* Shah Alam High Court Suit No. MT4-22-567-1997 and obtained summary judgment against the customer on 26 January 1999, in the sum of RM1,660,733.57 as at 11 November 1999 and interest at 15.5% from 12 November 1999 until full realisation and costs on a solicitor-client basis. The question now before me is whether on the above facts the plaintiff has fulfilled the consideration of "agreeing to forbear and not to commence legal proceedings for recovery" against the customer.

It has not been disputed by the parties herein that the forbearance to sue the customer is good consideration for the guarantee (see also *Miles v. New Zealand Alford Estate Co* [1866] 32 Ch 266; and p. 21 *Law Of Guarantees* by Geraldine Andrews and Richard Millet published by Longman).

The consideration in the guarantee herein relating to a forbearance to sue does not contain any express provision governing the time frame for such forbearance. If no express time for forbearance is stipulated by the surety, as in the instant case, then a reasonable time may be implied, and if so implied would be sufficient consideration: *Oldershaw v. King* [1857] 2 H&N 517; and p. 22, *Law Of Guarantees supra*. It is my considered view that on the aforesaid facts the plaintiff is not in breach of the consideration in relation to a forbearance to sue, and since no express time is stipulated in the forberance,

the law implies that so long as the plaintiff as promisor of the consideration has exercised the forbearance to sue after a reasonable time such as a couple of weeks in the instant case, then the plaintiff would not be in breach of the guarantee by exercising the right to sue, as has happened here. Hence, cases such as *Cooper v. Joel* [1859] 1 De GF & J 240; *Rolt v. Cozens* [1856] 18 CB 673 referred to at p. 23 in *Law Of Guarantees supra*, may be distinguished accordingly.

In the event that I have occasioned an error in arriving at the aforesaid conclusion, it is necessary to proceed to consider that the guarantee is further supported by the consideration flowing from the plaintiff to give the financial facilities to the customer, and pursuant thereto, the defendant as guarantor has guaranteed as principal debtor the payment of all outstanding sums due and owing by the customer to the plaintiff. The time for payment is undefined or unspecified in the guarantee before me. In such a case, I am of the view that this consideration is enforceable. In this respect, it is pertinent to refer to the view of the learned authors at p. 13 of the *Law Of Guarantees supra*, who stated as follows:

> Notwithstanding a decision to the contrary never formerly overruled (*Semple v. Pink* [1847] 1 Exch. 74), it is submitted that in this case also the promise is enforceable, if the creditor has forborne for such a time as judging from the circumstances and presumable intentions of the parties at the date of the promise a court may find to have been a reasonable time (see *Mapes v. Sidney* [1624] Cr Jac 683; 79 ER 592; *Emmott v. Kearns* [1839] 5 Bing (NC) 559; 132 ER 1214; *Johnson v. Whitchott* [1639] 1 All Ebr 24 at 33; *Beven v. Cowling* [1626] Poph 183; 79 ER 1277; *Barber v. Mackrell* [1892] 41 WR 618; 41 WR 341; *Nikaldi Sportswear Inc v. Mear* [1977] 5 BCLR 79 (Can))

I agree and apply the above passage of the learned authors to the facts of the instant case. The plaintiff as creditor has forborne for a couple of weeks which I consider to be a reasonable time in the circumstances of the case and the presumable intentions of the defendant as guarantor and the plaintiff as the creditor at the date of the promise i.e. 23 May 1997. The guarantor's promise which was given to the plaintiff in consideration of the plaintiff giving the customer the said financial facilities is therefore enforceable.

Interest

The interest which may be imposed on the financial facilities is governed and regulated by the terms and conditions to which the customer and the plaintiff have agreed, in particular cl. 7 of exh. B1 in the plaintiff's affidavit in support. By the said cl. 7, the customer has agreed to pay the plaintiff 'interest at a

rate which is equivalent to 2% above your cost of fund on any amount due and owing to you (prescribed rate) on my/our account. The prescribed rate shall continue to be chargeable on all sums due and owing before and after court judgment until full settlement. A statement signed by your accountant or any authorised (sic) officer as to your cost of fund shall be conclusive for all purposes.'

The effect of the submission for the defendant is that the sum of RM1,660,733.57 together with interest at 15.5% includes the charging of interest upon interest and so runs foul of proviso (a) to s. 11 of the Civil Law Act 1956, which reads as follows:

> In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section
>
> (a) shall authorise the giving of interest upon interest;
>
> (b) ...
>
> (c) ...

Section 11 clearly confers on the court the power to order such rate of interest as the court thinks fit on any judgment sum, for the period with effect from the date the cause of action arose to the date of realisation, subject to, in this case, proviso (a) which prohibits the court from giving interest upon interest i.e. compound interest. The general principle and the proviso as enacted in s. 11 and 11(a) respectively was applied by the then Supreme Court in *Yeng Hing Enterprise Sdn Bhd v. Datuk Dr Ong Poh Kah* [1988] 2 MLJ 60, where Seah, SCJ (delivering the judgment of the court) at p. 61 right hand column A-C held that where there was no express or implied agreement as to the payment of compound interest, s. 11 proviso (a) forbids the giving of interest upon interest. The tenor of the Supreme Court judgment also made it clear that compound interest or interest upon interest or capitalisation of interest, as it is used in the financial arena, is permissible if the agreement of the parties expressly or impliedly provides for such payment. That being the case, it is necessary for me to scrutinise the said cl. 7 to ascertain whether the customer and the plaintiff have expressly or impliedly agreed to such payment. Under cl. 7, the customer has expressly agreed to pay interest at the prescribed rate on his account and such prescribed rate shall continue to be chargeable

on all sums due and owing before and after judgment until full settlement. Upon a proper construction of the express provision of cl. 7, it is my finding that so long as there is a sum of money due and payable by the customer to the plaintiff, interest at the prescribed rate would be chargeable on the customer's account, and this process of charging interest on all sums due and payable would continue until settlement. In other words, cl. 7 to which both the customer and the plaintiff have expressly agreed obliges the customer to pay all interest including interest upon interest. Therefore, pursuant to the Supreme Court judgment in the *Yeng Hing* case, *supra*, the plaintiff is perfectly entitled to recover all the compound interest accrued, the payment of which the defendant has expressly guaranteed.

A final point was raised for the defendant in respect of the certificate of indebtedness which learned counsel submitted contained a manifest error. Upon a proper perusal of cl. 12 of the guarantee, I notice that it has been expressly agreed that "a statement of account in writing showing the indebtedness of the customer to you duly certified by your accountant or authorised representative shall in the absence of manifest error, be binding and conclusive against the guarantors" etc. In the defendant's affidavit affirmed on 7 April 1999, para 8.2 alleges that in the senior accountant's certificate, exh. B4, the plaintiff has failed to give details of the principal sum and the interest. There was however no allegation of any manifest error occasioned by the plaintiff or the said senior accountant. Exhibit B4 is the certificate of indebtedness issued by the plaintiffs senior accountant giving detailed transactions of the customer, but the customer has not affirmed any affidavit alleging any general or specific manifest error. The submission of learned counsel for the defendant in this respect is that the said certificate of indebtedness did not show or state the sum of RM1,660,733.57 claimed by the plaintiff. It is my specific finding that the certificate of indebtedness instead showed the total outstanding larger sum of RM1,740,548.54 as at 27 February 1998, but the plaintiff's claim as affirmed in the affidavit in support and averred in the statement of claim was for RM1,660,733.57 as at 11 November 1997 with interest at 15.5% per annum running from 12 November 1997 until full realisation. This does not appear to have been challenged or disputed by the defendant in his affidavit in reply. In my view, there is no manifest error in the said certificate of indebtedness. The burden of proving that there is a manifest error is on the person alleging it i.e. the defendant herein who is not prevented from questioning the correctness or otherwise of the account sought to be produced as conclusive evidence against him: *Oriental Bank Bhd v. Jaafar Sidek Mohd Salam & 2 Ors* [1990] 2 CLJ 72. However, on the affidavits before me, the defendant has not successfully discharged that burden of proving that exh. B4 contains

a manifest error, in which case, cl. 12 of the guarantee is binding on the defendant and so exh. B4 is conclusive evidence of the debt claimed by the plaintiff against the defendant. A similar conclusive evidence clause existed in *D&C Nomura Merchant Bankers Bhd v. Gunung Kuari Sdn Bhd & 3 Ors* [1990] 2 CLJ 58 and was held to be binding in the absence of a manifest error.

On the foregoing grounds, I hold that the decision of the registrar giving O. 14 judgment in favour of the plaintiff is correct and is hereby upheld. The defendant's appeal is accordingly dismissed with costs.